Supreme Court, U. S.
FILED
FEB 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*

—v.—

MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, etc., *Petitioner,*

—v.—

MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, *et al.*, *Petitioners,*

—v.—

JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW and DR. DOMINGO C. SORONGON, *Petitioners,*

—v.—

JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS *AMICI CURIAE*

ALVIN BRONSTEIN
National Prison Project
American Civil Liberties Union
1346 Connecticut Ave., NW
Washington, D. C. 20036

ROBERT PLOTKIN
Special Counsel
National Legal Aid and Defender Association
1220 19th Street, N.W.
Washington, D. C. 20036

BURT NEUBORNE
New York University School of Law
40 Washington Sq. So.
New York, New York 10016

MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775

TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus 2

ARGUMENT 3

Introduction 3

I. IT WOULD BE INAPPROPRIATE TO ALTER THE SETTLED STATUTORY CONSTRUCTION OF 42 U.S.C. §1983 IN LIGHT OF CONGRESSIONAL ACQUIESCENCE IN THE PREVAILING PRACTICE OF NOT REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES UNDER 42 U.S.C. §1983. 7

II. A REQUIREMENT OF EXHAUSTION OF ADMINISTRATIVE REMEDIES WOULD IMPOSE AN UNACCEPTABLE DELAY UPON PERSONS SEEKING TO VINDICATE CONSTITUTIONAL RIGHTS. 10

CONCLUSION 17

Table of Authorities

Cases:

Abbot Laboratories, Inc. v. Gardner, 367 U.S. 362 (1967) 3, 14

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 8

Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. 395 (1975) . . 9

Damico v. California, 389 U.S. 416 (1967) 8

Harrison v. N.A.A.C.P., 360 U.S. 167 (1959) 17

Houghton v. Shafer, 392 U.S. 639 (1968) 8

King v. Smith, 392 U.S. 309 (1968) 8

McGee v. United States, 402 U.S. 479 (1971) 14

McKart v. United States, 395 U.S. 185 (1969) 3, 14

McNeese v. Board of Education, 373 U.S. 668 (1963) . . 5, 7, 10, 11

Monroe v. Pape, 365 U.S. 167 (1961) 5, 8, 9

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) . . . 3

Preiser v. Rodriguez, 411 U.S. 475 (1973) 8

Steffel v. Thompson, 415 U.S. 452 (1974) 5, 8, 11

United States v. Raines, 362 U.S. 17 (1960) 8

Wilwording v. Swenson, 404 U.S. 249 (1971) 8

Civil Rights Act of 1871

42 U.S.C. §1983 . . . . . passim

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
No. 75-44

ROBERT BURRELL, Petitioner,
v.
MILTON McCRAY, Respondent.

SERGEANT V. D. SMITH, Etc., Petitioner,
v.
MILTON McCRAY, Respondent.

GERALD McCLELLAN, Et Al., Petitioners,
v.
JAMES E. X. STOKES, Respondent.

DR. HAROLD M. BOSLOW and
DR. DOMINGO C. SORONGON, Petitioners,
v.
JOHN WASHINGTON, Respondent.

On Writ of Certiorari to the
United States Court of
Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICI CURIAE

Interest of Amici

The American Civil Liberties Union is a membership organization devoted to the protection and enforcement of individual rights guaranteed by the Constitution of the United States. The National Legal Aid and Defender Association is an organization consisting of attorneys employed by legal aid, legal services, and public defender offices. Many of the clients of member-attorneys are or have been imprisoned or in jail.

Experience has taught amici that the practical efficacy of a constitutional right is no greater than the procedures available to vindicate it. We believe that history and logic point to the same conclusion--that devices which impede access to the judiciary in cases involving constitutional rights inexorably, if unintentionally, result in a de facto weakening of those rights. The imposition of a requirement of exhaustion of state administrative remedies upon prisoners seeking federal judicial redress for alleged violations of federally protected constitutional rights would erect a procedural barrier which would seriously compromise the tenuous strides which have been made to provide minimum constitutional protection to the 250,000 persons currently in American jails. Consents to the filing of this brief have been secured from the parties and have been filed with the Court.

ARGUMENT

Introduction

A requirement of exhaustion of administrative remedies is generally thought to serve several social policies. E.g., Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); McKart v. United States, 395 U.S. 185 (1969). First, it channels decision-making in a given area, at least initially, to an executive forum in the hope that internally generated solutions will be more acceptable to and more vigorously enforced by the administrative officers involved; second, it forces the upper reaches of a bureaucracy to confront the problems prevalent at the operational level; and, third, it permits the infusion of additional administrative expertise prior to judicial resolution of an issue. Moreover, it is often deemed appropriate to require persons who have not yet felt the practical impact of an administrative action to pursue redress in the executive branch, in order to spare the judiciary the burden of confronting an issue prematurely and, perhaps, unnecessarily. Cf., Abbott Laboratories, Inc. v. Gardner, 367 U.S. 362 (1967).

However, a doctrine of exhaustion of administrative remedies as a decision-deferral mechanism carries with it serious social liabilities - especially when deferral is imposed upon persons seeking judicial redress for violations of constitutional rights. First, and most importantly, exhaustion in such a Constitutional context may, and often does,

result in prolongation of constitutionally impermissible conduct; second, it imposes an additional burden of expense on persons seeking access to the courts to vindicate their rights and, third, it promotes a false notion of economy, causing unnecessary duplication of effort, especially in situations where the administrative agency involved lacks genuine expertise in dealing with the legal questions it is called upon to resolve. Finally, a requirement of exhaustion of administrative remedies inevitably raises questions concerning the practical efficacy of the administrative remedy and the likelihood of its acting to insulate unconstitutional activity from expeditious and effective judicial review.

Obviously, reasonable persons may differ as to the appropriate balance which should be struck between the benefits and detriments flowing from the imposition of an exhaustion requirement in various factual contexts. However, in the context of state violations of federally protected constitutional rights, it has been the settled understanding of this Court, as well as the lower federal courts, that Congress, in enacting the Civil Rights Act of 1871 (42 U.S.C. §1983), had struck the balance in favor of expeditious federal judicial redress of state-imposed constitutional violations. Accordingly, this Court has consistently construed 42 U.S.C. §1983 as forbidding a judicially imposed exhaustion requirement - whether of state judicial or state

administrative remedies. E.g. Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Education, 373 U.S. 668 (1963); Steffel v. Thompson, 415 U.S. 452 (1974). Moreover, the acquiescence of Congress in such a settled construction of 42 U.S.C. §1983 is testimony to Congressional satisfaction with the judiciary's insistence that expeditious redress of Constitutional violations be of primary concern in applying 42 U.S.C. §1983.

It is possible, of course, to secure the benefits of exhaustion without risking its liabilities by the simple expedient of establishing convenient and effective administrative remedies as a voluntary alternative to judicial review. The healthy necessity to compete which such a voluntary administrative remedy must, of necessity, exhibit would increase its effectiveness and insure careful internal review of complaints. However, if such a system were freed from the need to gain the confidence of persons appealing to it, its effectiveness will be impaired at the very time that a complainant is cut off from speedy access to any alternative forum.

Amici do not oppose the creation of voluntary administrative remedies as an alternative to the judicial resolution of §1983 claims. However, if administrative review is, even partially, to supplant judicial review in the constitutional area, it should be as the result of perceived confidence which administrative review has earned, rather than as the result of mandatory controls on a complainant's choice of forum.

Amici suggest, first, that if petitioners wish to disturb the prevailing, settled statutory construction which this Court has given to 42 U.S.C. §1983, their appropriate remedy lies with Congress; for it would be inappropriate for this Court, in effect, to judicially amend 42 U.S.C. §1983 in light of Congress' acquiescence in the settled construction. Alternatively, should this Court deem itself free to re-examine the prevailing construction of 42 U.S.C. §1983, amici urge that the benefits thought to flow from an exhaustion rule are far outweighed by the unacceptable delay which an exhaustion requirement would impose upon persons seeking vindication of their constitutional rights - especially in the factual settings presented by this appeal.

Finally, the mere fact that an exhaustion requirement might relieve docket pressures on the lower Federal courts is no justification for its adoption unless it is desirable without regard to the convenience of the judiciary. Expediency can never be a permissible basis for delaying access to the Courts.

I. IT WOULD BE INAPPROPRIATE TO ALTER THE SETTLED STATUTORY CONSTRUCTION OF 42 U.S.C. §1983 IN LIGHT OF CONGRESSIONAL ACQUIESCENCE IN THE PREVAILING PRACTICE OF NOT REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES UNDER 42 U.S.C. §1983.

As the carefully considered decision of the Court below recognizes, it has been the settled practice of this Court - and of the lower Federal courts - to construe 42 U.S.C. §1983 in accordance with the plain meaning of its words as providing a cause of action for the expeditious redress of a state imposed deprivation of a Federal constitutional right without requiring the exhaustion of state administrative remedies. E.g., McNeese v. Board of Education, 373 U.S. 668, 675 (1963)(declining to require the exhaustion of a state administrative remedy which was merely advisory);[1]

---

1 Of course, the administrative remedy at issue herein is also advisory, since the Grievance Commission has power merely to recommend its findings to prison officials. Indeed, the Grievence Commission has even less power than did the "inadequate" administrative body in McNeese, which, at least, had theoretical power to cut off funds to the erring school district. McNeese v. Board of Education, supra at 675-676. Thus, amici respectfully suggest that the instant cases are hardly the proper vehicle to

Damico v. California, 389 U.S. 416 (1967); Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968); Wilwording v. Swenson, 404 U.S. 249 (1971); Preiser v. Rodriquez, 411 U.S. 475 (1973); Steffel v. Thompson, 415 U.S. 452 (1974); see also, Monroe v. Pape, 365 U.S. 167 (1961)(declining to require the exhaustion of an available and effective state judicial remedy). This Court's refusal to permit access to the courts to be burdened by the need to exhaust time-consuming and problematic state remedies (both executive and judicial) is fully consistent with the desire of Congress to create, in 42 U.S.C. §1983, a vehicle for expeditious

---

discuss or to rule upon a requirement that a genuinely effective administrative remedy be exhausted. Surely, precatory administrative remedies can never justify the deferral of judicial consideration of colorable allegations of the violation of constitutional rights. Accordingly, amici suggest that serious consideration be given to dismissing certiorari herein as improvidently granted and awaiting the presentation of a case or controversy which actually raises the issue of whether a binding, as opposed to an advisory, administrative remedy must be exhausted. In the absence of such a case or controversy, this Court has deemed itself precluded from addressing itself to hypothetical situations not raised by the parties actually before the Court. E.g., United States v. Raines, 362 U.S. 17 (1960); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Federal judicial review of state imposed violations of the Federal Constitution. See generally, Monroe v. Pape, supra at 183. It is not necessary, however, to search the legislative history of the 1871 Act for additional clues to Congress' will since Congress, by acquiescing in the vision of §1983 enunciated by the Federal courts, has adopted and ratified the prevailing construction. Thus, any change in the prevailing construction would constitute not only a mis-reading of the intent of Congress in 1871, but also a flouting of the intent of the current Congress. Cf. Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. 395, 411 (1975).

When Congress wishes to burden access to the Courts in this area with an exhaustion requirement it is, of course, quite capable of doing so explicitly. E.g., 28 U.S.C. 2254, (requiring exhaustion before seeking Federal habeas corpus). Given Congress' decision not to burden §1983 with a similar exhaustion requirement, it would be an impermissible exercise of judicial law-making for this Court to legislate in thearea.

II. A REQUIREMENT OF EXHAUSTION OF ADMINISTRATIVE REMEDIES WOULD IMPOSE AN UNACCEPTABLE DELAY UPON PERSONS SEEKING TO VINDICATE CONSTITUTIONAL RIGHTS.

In Monroe v. Pape, supra, this Court ruled that the delay inherent in presenting a claim arising under the Civil Rights Act of 1871 to state courts prior to seeking relief in a Federal court was inconsistent with Congress' intent to provide a readily available "supplemental" Federal forum for the redress of state imposed violations of constitutional rights. If Congress was unwilling to tolerate the delay inherent in presenting Federal constitutional claims to an independent state judiciary bound by the strictures of the Supremacy Clause, it is an a fortiori proposition that Congress was not prepared to tolerate the delay inherent in presenting the identical constitutional claims to a state administrative body, linked closely with the very bureaucrats it purports to review, unencumbered by legal expertise, and incapable of providing binding or effective relief.

A. The Grievence Commission Does Not Provide an Adequate Administrative Remedy.

Petitioners argue that the substantial body of case law relied upon by the Court below stands merely for the obvious proposition that

inadequate state administrative remedies need not be exhausted as a pre-condition to §1983 review. Even if such a crabbed reading of the McNeese-Steffel line of authority is tenable, the serious deficiencies present in the Maryland system renders it "inadequate" as a matter of law.

First, and most importantly, the Grievance Commission is given solely advisory powers. As McNeese explicitly held, an administrative remedy which results merely in a "recommendation" that unconstitutional behavior be terminated can never justify the refusal to entertain an action under 42 U.S.C. §1983. Moreover, the refusal to vest the Commission with power to appoint counsel for indigent complainants in appropriate cases or with power to award compensatory relief reinforces the inadequate status of the Commission as a forum for the effective resolution of Federal constitutional questions. It is inconceivable that an administrative body lacking power to enforce its decisions and lacking the capacity to assure meaningful adversary process can be held to constitute a satisfactory alternative forum within which to consider issues touching the constitutional rights of complainants.

B. No Societal Benefits Would Flow From Channeling Respondents' Complaints Into an Executive Forum.

The question of whether to require exhaustion of administrative remedies may emerge in at least four factual settings.

First, a complainant may seek damages for the past imposition of unconstitutional conditions upon him under a set of rules which are no longer in effect.

Second, a complainant may seek relief from a continuing or imminently threatened violation of constitutional rights under a set of rules which remain in effect.

Third, a complainant may seek damages for past violation of constitutional rights which are not likely to recur under a set of rules which remain in effect.

Fourth a complainant may seek equitable relief from a threatened violation of constitutional rights which does not yet impose a practical detriment on him.[2]

---

[2] The factual settings in which an exhaustion issue is likely to arise may be summarized as follows:

(Continued next page)

(footnote continued)

	Status of Alleged Injury	Relief Sought	Status of Administrative Rules Pursuant to Which Challenged Action Was Taken
I.	Past Incident	Damages	No Longer in Effect
II.	Continuing Incident or Past Incident Likely to be Repeated	Injunction or Damages	Remains in Effect
III.	Past Incident Not Likely to be Repeated	Damages	Remains in Effect
IV.	Future Incident	Injunction	Remains in Effect

When a complaint falling within category IV is filed, the social benefits flowing from exhaustion, see, supra, pp 3-4, outweigh any social detriment which may flow from the doctrine. Accordingly, when such fact patterns have emerged, this Court has required exhaustion of administrative remedies as a pre-condition to judicial review. Thus, cases such as McKart v. United States, 395 U.S. 185 (1969) and McGee v. United States, 402 U.S. 479 (1971), represent this Court's recognition that a requirement of exhaustion of administrative remedies is particularly appropriate in situations when a complaining party is not immediately affected by the allegedly improper executive action.[3]

However, whether such cases are perceived as "exhaustion"[4] or "ripeness"[5] decisions, they are readily distinguishable from category I situations in which a complainant seeks damages for past incidents which have taken place under rules which are no longer in effect. When such a complaint is filed, none of the social bene-

---

3 As a matter of statutory construction, however, even a category IV case, where the injury is inflicted by state officials, cannot be subjected to a requirement of exhaustion of administrative remedies. See Point I, supra.

4 McKart v. United States, supra.

5 Abbot Laboratories, Inc. v. Gardner, 367 U.S. 497 (1967).

fits thought to accrue from the exhaustion doctrine are present. Accordingly, no serious case may be advanced in such a situation for burdening access to a Federal judicial forum with a socially useless exhaustion requirement. Yet that is precisely the situation revealed by the McCray complaints in this case. The rules pursuant to which McCray was subjected to the inhuman treatment described by the Court below have already been altered by the administrative hierarchy. Only the adjudication of questions of Federal constitutional law and the allocation of individual liability remains. Given the conceded inability of the Commission to award compensatory relief and the fact that the rules under which McCray was confined have already been altered, requiring him to exhaust a meaningless ritual prior to seeking compensatory relief would be absurd.

Category II presents only a slightly different balance than Category I. On the one hand, the rule pursuant to which the challenged action was taken remains in effect. Thus, some social benefit may be said to flow from channeling the initial consideration of its validity into an executive forum. However, the violation of constitutional rights of which the plaintiff complains continues (or is likely to recur) during the pendency of the administrative proceeding, rendering unacceptable the cost of exhaustion - the prolongation of constitutional deprivation. If one must balance the prolongation of unconstitutional conduct against the problematic values of administrative exhaustion, the result clearly favors expeditious access to

the federal courts.[6]

Category III presents the most difficult balance. When a complainant seeks damages for a past incident not likely to recur and the challenged rule remains in effect, administrative exhaustion would appear to provide benefits without imposing serious social detriments. However, such a fact pattern is not before this Court.

Thus, since all four complaints before this Court involve fact patterns under which the detriments flowing from an exhaustion requirement far outweigh any benefits, it would be improper to impose such a requirement upon them.[7]

---

[6] The Stokes and Washington complaints fall within Category II, since each alleges the current violation of a constitutional right or a past violation which is imminently likely to recur.

[7] If this Court should impose an exhaustion requirement in this case, it must at the very least recognize that any exhaustion requirement insulates continuing constitutional deprivations from judicial scrutiny during the pendency of the administrative process. Such a danger can be eliminated, however, by exempting applications for interim equitable relief from any exhaustion requirement, while permitting exhaustion to go forward prior to the entry of a final decree. (Continued next page)

CONCLUSION

For the reasons stated above, the decision of the Court below should be affirmed.

Respectfully submitted,

ALVIN BRONSTEIN
National Prison Project
American Civil Liberties Union
1346 Connecticut Ave. N.W.
Washington, D. C. 20036

ROBERT PLOTKIN
Special Counsel
National Legal Aid and Defender Association
1220 - 19th Street N.W.
Washington, D. C. 20036

BURT NEUBORNE
New York University
School of Law
40 Washington Square, So.
New York, New York 10012

MELVIN L. WULF
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amici

February 1976

Whenever this Court has imposed a decision-deferral mechanism on persons seeking relief from constitutional violations, it has qualified the mechanism by reiterating the power of a Federal court to issue appropriate interim equitable relief during the pendency of the alternative process. See Harrison v. N.A.A.C.P., 360 U.S. 167, 179 (1959).